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IN THE

Supreme Court of the United States

OCTOBER TERM, 1940

No. 12

THE UNITED STATES OF AMERICA,
Petitioner,

v.

APPALACHIAN ELECTRIC POWER COMPANY,
Respondent.

RESPONDENT'S SUPPLEMENTAL BRIEF FILED BY SPECIAL LEAVE OF COURT.

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October 19, 1940

On Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

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RESPONDENT'S SUPPLEMENTAL BRIEF FILED BY SPECIAL LEAVE OF COURT.

I.

Virginia's position regarding constitutional questions.

The brief in behalf of the Commonwealth of Virginia, *amicus curiae*, sets forth, as the seventh and last of the series of propositions argued in the brief, that the State is entitled to a decision now on the constitutionality of the capture clause (Section 14) as well as any other license provisions of the Power Act (Va. Br., p. 73). Under the facts concurrently found by the lower courts upon substantial evidence, the Rivers and Harbors Act of March 3, 1899 and the Federal Power Act are so plainly inapplicable to re-

spondent's project that no constitutional questions are presented for decision and, of course, even if either statute were construed as applicable to the respondent's project, the Court would not reach the constitutionality of license conditions if, as we believe, petitioner is without constitutional authority to require any license.

However, if, contrary to our view, the Court should reach the question of the constitutionality of license conditions in its disposition of this case, we fully agree that both the State of Virginia and respondent are entitled to a decision now upon the constitutionality of the capture clause. In addition to the authorities and arguments in our main brief (pp. 131-3), it may be noted that *Fox River Paper Company v. Railroad Commission*, 274 U. S. 651, clearly supports this position. In that case both the Supreme Court of Wisconsin and this Court passed upon the validity of the capture provision of the Wisconsin law and sustained the provision upon the ground that it was not confiscatory under the established law of property as determined by the highest court of that State.

It may also be noted that petitioner's argument in its reply brief, that respondent could not question the license conditions if its project were located in navigable waters or impaired navigable capacity (Pet. Reply Br., pp. 37-8), is not only inapposite on the facts but also erroneous in law. Where a project is located on a non-navigable stream the only right of petitioner under Section 10 of the Rivers and Harbors Act is to enjoin such operation as will impair navigable capacity. *U. S.* v. *Rio Grande D. & I. Co.*, 174 U. S. 690. Petitioner has no right to enjoin the construction or require a license for such operation of the project as will not impair navigable capacity. Furthermore, as petitioner concedes (Pet. Reply Br., pp. 38-9), even where petitioner has constitutional authority to require a license, it may only impose license conditions which have a real and substantial relation not only to some constitutional authority of petitioner but also to the source of its licensing au-

thority. Consequently, even in a situation where petitioner is authorized to require a license, the petitioner not improvidently concedes that the constitutionality of license conditions is presented for determination.

II.

The *Fox River Paper Company* case.

The case of *Fox River Paper Company* v. *Railroad Commission of Wisconsin*, 274 U. S. 651, dealing with a navigable stream and with riparian rights under the laws of Wisconsin is of course entirely inapposite to respondent's project, located on a non-navigable stream and involving riparian rights under the laws of Virginia. However, the discussion of the case as contained in the brief of the State of Wisconsin, *amicus*, serves to focus the more sharply the distinction between, on one hand, the sovereign power of the States in respect of all streams, including navigable waters of the United States, and, on the other hand, the authority of the Federal Government to regulate navigation upon, and protect the navigable capacity of, interstate navigable waters.

The Fox River Paper Company in its controversy with the Railroad Commission of Wisconsin had, as a riparian owner, only incomplete or limited* rights in the Fox River,

* To state the matter in more detail, the State of Wisconsin, on being admitted to statehood, acquired, subject to the limited right of the Federal Government to regulate navigation, the complete "bundle of rights" with respect to those portions of navigable rivers (of which the Fox River is one) located within her boundaries. Thereafter the State granted a portion, but only a portion, of those rights to the riparian owners. Among those retained by the State were certain rights in connection with the erection of structures in navigable streams. Thus, this Court cited the Wisconsin court as holding in effect that, without the consent of the State, "the riparian owner can have no right in the water power created by damming a navigable river" (*Supra*, 656). The Wisconsin Court held in effect that, if the Fox River Paper Company, a riparian owner, desired that the State part with that right, it would have to pay the price which the State by statute had prescribed; and

(*Footnote continued on next page.*)

the full rights of the State never having been granted to the riparian owner, whereas in the instant case respondent, by virtue of its riparian ownership plus its license from the State of Virginia, holds the *full* rights of the State of Virginia for the purposes of its water power development. In other words, respondent stands in the shoes of Virginia. Consequently, even if (contrary to the fact) respondent's project were in navigable waters and petitioner had constitutional authority to require some license, we would be squarely confronted with the question whether the Federal Government might impose such license conditions upon the State of Virginia itself. It would then become pertinent to inquire what rights the State of Virginia has in those parts of navigable waters situated within her borders. The answer to that question is clear. It is that the States hold

> "*the absolute right to all their navigable waters and the soils under them* for their own common use, subject only to the right since surrendered by the Constitution to the general government." (*Martin* v. *Waddell*, 16 Peters 367, 410.)*

On the other hand, the character of that right which, in respect of navigable waters, was surrendered to the Federal Government is described concisely in *Port of Seattle* v. *Oregon & Washington Railroad Co.*, 255 U. S. 56, 63, wherein this Court stated:

> "The right of the United States in the navigable waters within the several States *is limited* to the control thereof for *purposes of navigation.*"

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that, because its property right under Wisconsin law did not embrace the right to build a dam in navigable waters, this requirement was not a taking of the riparian owner's property. And this Court held that there was no basis for it to disturb the Wisconsin rule of property (*Supra*, 656-7).

The situation as between respondent and the Federal Government is significantly different. Respondent holds not merely that portion of the "bundle of rights" which the State of Virginia has granted to respondent as a riparian owner but, by virtue of the Virginia license, respondent holds the remainder of the "bundle of rights", that is, respondent stands in the shoes of the State of Virginia.

* All italics are supplied unless otherwise specifically indicated.

Certainly, in view of the plenary* power of the State of Virginia on the one hand, and this very limited right** of the Federal Government on the other, it could not seriously be urged that the Federal Government has any authority to impose upon the State itself a requirement that the State agree to cede to the Federal Government a part of its physical domain, its sovereign powers with respect thereto, its soil and its waters, as well as other of its property, as a condition precedent to the State's construction of a water power development within its own borders.

The inappositeness of *Fox River Paper Company* v. *Railroad Commission* to support petitioner's argument, to the effect that (where authority to impose any license exists) its authority to impose license conditions is essentially the same as that held in the *Fox River Paper Co.* case to reside in the State of Wisconsin, is further emphasized if we apply the claimed licensing power of petitioner (in respect of navigable waters) to a hypothetical Fox River Paper Company which in the year 1926 proposed to construct in the Fox River, a navigable water of the United States as well as of Wisconsin, a new dam (not one constructed in 1878, long before the Act of 1899 was passed and of course before the Federal Water Power Act of 1920). Such hypothetical Company could under the controlling Wisconsin statute, as upheld in *Fox River Paper Company* v. *Railroad Commission*, obtain the consent of the State, through its agent Commission, only upon condition that it be subject, "at any time after the expiration of thirty years," to acquisition of its project by the State under the specified conditions of the Wisconsin statute.

Having complied with the Wisconsin statute and having received the requisite permit from the State Railroad Commission, this hypothetical Company would have vested in it the full and complete right to construct its dam and develop

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* *Cf. Fox River Paper Co.* case, 654.

** This also is plenary but only within its limited sphere.

thereat water power, subject only to the authority of the United State to regulate navigation (commerce). Such authority on the part of the United States includes the authority to forbid the construction of this hypothetical Company's dam on the ground, but only on the ground, that it will constitute an obstruction to the navigable capacity of the Fox River.

Thereupon there arises, in the case of this hypothetical Fox River Paper Company, the question as to whether Congress through its agency, the Federal Power Commission, could superimpose upon that Company, already vested with full and complete rights (property and other) under the laws of Wisconsin, license conditions which have no relation to the protection of the navigable capacity of the Fox and which indeed include a contractual right on the part of the United States to take over, at the end of the term of the Federal license, the entire property of the Company. We submit that, as shown in our main brief, pages 121 *et seq.*, no such authority inheres in the Federal Government, and this is quite aside from the confiscatory aspect of the federal capture provision even in the case of a project in a navigable water of the United States.

It is perfectly obvious from what has been stated above, that, if the limited authority of the Federal Government to regulate navigation were sufficient constitutional support for all of the license conditions which the Federal Power Commission seeks to impose, it necessarily follows that the Wisconsin Water Power Act, involved in the *Fox River* case, and the Virginia Water Power Act, with both of which the conditions sought to be imposed by the Federal Power Commission conflict, are as a practical matter nullified.

III.

Petitioner cannot, by filing *ex parte* documents or statements, supplement the record in this Court or affect the determination of this cause by this Court on the record as made.

It is the position of respondent that the factual bases upon which this case must be determined in this Court are conclusively and finally established by the concurred in findings of the lower courts. Manifestly, whether or not those findings are supported by substantial evidence must be determined upon the record.

Nevertheless, on the argument of this cause, petitioner sought to supplement the record by filing two documents, prepared *ex parte* and long after the decree had been entered in the District Court and affirmed by the Court of Appeals, purporting to set forth certain alleged facts in connection with a flood which occurred on Upper New River in August, 1940. The documents in their complete form were handed to counsel for respondent on the morning of the argument.

Neither the Federal Government nor any other litigant can supplement the record *ex parte* in this Court and thereby undertake to have the rights of an adversary determined without due process of law. These *ex parte* documents manifestly could not be treated as any part of the record upon which this case must be determined in this Court, nor could any of the alleged facts set forth in these documents be given any consideration or weight.

While respondent believes that the *ex parte* document, entitled "Flood Conditions in the New and Kanawha River Valleys", does not support any claim of adverse effect upon the navigable capacity of the Kanawha River (the only navigable water of the United States involved), the alleged facts set forth in the report are grossly erroneous and flatly challenged by the respondent. Had such a document been offered and received in evidence in this cause (and, for

the reasons hereinafter stated, it could not have been offered and received as an official document), the alleged facts urged by petitioner would have been fully rebutted and refuted by respondent. Indeed, the true facts would show that the effect of respondent's project was to reduce the crest of the flood on the navigable Kanawha River, although undoubtedly such incidental reductions in flood crest have no substantial beneficial effect upon navigation or navigable capacity.

The District Court found, and the Court of Appeals affirmed the finding, that the effect, if any, of respondent's project upon flood conditions would be beneficial. Obviously, if the power reservoir is partially empty when a flood occurs, the incidental effect is beneficial, but, even if the power reservoir should happen to be full when a flood occurs, the evidence clearly established that there would be no adverse effect upon flood conditions. This is squarely supported by the testimony of Dr. Mead, Consultant on the Boulder Dam Project, Tennessee Valley Authority Project, member of the Engineering Board for Flood Control on the Hua[illegible] River, China, and at the time President of the American Society of Civil Engineers (R. 1991-2; 1942-52). In petitioner's Ex. 145, the Army Engineers, in considering a system of projects of power development on the tributaries of the Kanawha River stated (H. D. 91, 74th Cong., 1st Sess., p. 73, par. 79):

> "Even if all the reservoirs should be full at the time of a heavy run-off, some reduction in the flood crest height would be obtained due to the large surface areas of the reservoir with consequent accompanying surcharge capacities which would have the effect of augmenting the valley storage over that existing under natural conditions."

Although the Solicitor General upon oral argument, by a slip of the tongue, referred to this document, upon which the ink was hardly dry, as a report of the Chief of Engineers, the alleged report in fact contains no comment or review by the division engineer or by the Chief of Engineers.

It has not gone through the well-established official course essential to give a document of this character status as an official document and involving correction and revision by superior officers. *United States* v. *Arizona*, 295 U. S. 174, 190, footnote 11. Indeed, were a private litigant to attempt to offer such a document in the trial of a cause to which the Government was a party, he would be met with the objection that it is a mere inter-departmental communication, that it is subject to revision and change by superior officers and that it is not an official document or report.

While it would be highly improper to attempt to supplement *ex parte* a record even by an official document (which of course is not conclusive of the rights of parties in the United States courts but is always open to rebuttal), the character of this document only emphasizes the impropriety of the attempt here made.

Since the document plainly cannot be considered here, it would be idle to point out the errors which appear even upon its face. However, it may be noted that the flood peak at Radford, as estimated by the United States Geological Survey, was 185,000 second-feet, while as estimated by the acting district engineer it becomes 214,000 second-feet. Undoubtedly this flood was the largest flood on record on upper New River, but certainly any claim that any damage or interference with navigation, or any impairment of navigable capacity of the Kanawha River, was brought about by operation of respondent's project cannot be sustained. If the petitioner thinks otherwise, it is entirely free to file a new suit under the Rivers and Harbors Act, which is the continuing protection of all navigable waters of the United States. Respondent is entirely confident, both that the petitioner will not choose to bring suit upon the basis of the flimsy and erroneous information set forth in the tendered document and also that, if the petitioner does attempt to bring such a second suit, it will entirely fail on the proof, even assuming that the facts alleged were legally relevant, which we deny.

IV.

The concurrent finding (of non-navigability) of the lower courts is not based upon erroneous legal criteria of navigability.

On oral argument and in its reply brief (Pet. Reply Br. 26-30), petitioner, virtually conceding that the finding of non-navigability by the District Court, affirmed by the Circuit Court of Appeals, is supported by substantial evidence, argued that the lower courts did not give proper weight to certain selected items of recollection testimony because, as petitioner claims, the lower courts applied erroneous criteria of navigability. Petitioner has made no attempt to show that the lower courts erred in adopting, as they did, the definition of navigability enunciated by this Court. Instead, it is clear on analysis that petitioner's criticisms are directed, not to the definition of navigability adopted and applied by the lower courts, but to comments by the lower courts upon the nature of, and weight to be given to, certain recollection testimony urged by petitioner.

Among the lines of testimony under consideration by the lower courts upon the issue of navigability were: (1) physical characteristics, (2) the conditions enconntered in the limited federal work, (3) uncontradicted evidence of complete lack of use before the Civil War under conditions which would have compelled the use of any practical water transportation, no matter how difficult, (4) the definite reports of Army Engineers that any use was and had been entirely local, (5) the official reports of the Army Engineers that the river is non-navigable throughout its course, (6) the considered action of Congress, (7) the testimony of expert and scientific witnesses, (8) recollection testimony other than that urged by petitioner and (9) the conduct of the Government as evidenced, for illustration,

by the construction of the Bluestone Dam* and by the conditions of the tendered license. All of this evidence negatived navigability.

The District Court after carefully weighing all of the evidence touching the issue, found;

> "From a consideration of all of it [the evidence], the conclusion is reached that New River is not and never has been navigable, either in its natural condition or after the improvements made, except in certain short and isolated stretches to each of which the navigation was local and confined within the limits of a single State; and that it has never been used, and has never been susceptible of use, as an avenue of interstate or foreign commerce." (R. 126).

The Court of Appeals, after independently weighing the evidence, affirmed this finding.

This recollection testimony was offered to show alleged trips or movements of small boats at various places on the river. Both lower courts found that the reports of the Army Engineers, many of them contemporaneously made by Army Engineers in charge of the federal work, are

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* Apropos respondent's statement that, were the stretch navigable, the Bluestone dam would constitute a complete barrier to any navigation between Hinton and Glen Lyn, petitioner states that

> "It is not entirely clear whether this dam will be equipped with a barge-lift" (Pet. Reply Br. 31, footnote)

and cites its attempted showing before the District Court in this cause at the trial of the facts in 1936. Were petitioner fully frank, it would admit that the latest approved drawings of the Bluestone dam, filed with petitioner's bill of particulars in its pending condemnation proceeding, are devoid of any indication of any provision whatsoever, present or future, for the passage of boats past the dam; also that the bill of particulars expressly states: "there being no facilities provided for water transportation."

Moreover, petitioner's contention here that the Bluestone dam will create a slack water pool extending upstream for 36 miles, *"when the dam is full"*, is strikingly naive in view of its contention in the said case in the District Court that the dam is to be for flood control, for its flood storage capacity must, of course, be kept *empty*.

the most reliable evidence of use, or lack of use, in the record and that they plainly establish that neither before, nor during, nor after, the federal work was the river used, or susceptible of use, for interstate commence. (R. 2897; 114, 116-7).

The lower court pointed out that the recollection testimony urged by petitioner has inherent infirmities and is obviously not entitled to the weight to be properly given to contemporary official records; that it was to a considerable extent contradicted or qualified by other recollection testimony; that the testimony was of a character "that the trial judge who sees and hears the witnesses is particularly well qualified to appraise"; and that in any event it had to be weighed by the trial court, and is to be weighed, if at all, by a reviewing court, in the light of all the other pertinent evidence in the case. The lower court then said:

> "But even if the recollection testimony of the witnesses on both sides is viewed as a whole *apart from the other evidence*, we do not think that it showed interstate navigability of the river within the requirements of the judicial decisions above mentioned" (R. 2902).

It was in connection with this independent survey of the recollection testimony, and after both courts had found that the progress reports of the Army Engineers are the most reliable evidence of use or non-use in the record, that the lower courts made the comments of which petitioner complains. The specific contention of the petitioner is that the lower courts gave too little weight to selected items of the recollection testimony offered by petitioner to show alleged movements of small boats (erroneously characterized by petitioner as actual navigation) at various places in the river, because such movements, if they occurred, were (1) difficult, (2) irregular and sporadic and formed no appreciable part of the commerce of the region and (3) had proved unprofitable and had been abandoned (Pet. Reply Br. 27-9). Petitioner's contentions are without substance.

(1) *The lower courts' comment on difficulties of navigation.*

As to the possibility that other than purely local movements of small boats may have occurred, the lower courts noted not only that the testimony was very vague and unsatisfactory but that, if such movements had occurred on occasions, they were among other things difficult. Specifically the Court of Appeals said in substance that, considering the recollection testimony urged by petitioner apart from the other evidence on the issue, such evidence at the most showed that "such trips could be made only at particular times when there was unusually high water; *that even then* navigation was not only difficult but also dangerous" (R. 2903). This was a perfectly proper comment upon the testimony, both as to its weight and as to whether or not it was evidence of navigable capacity within the criteria enunciated by this Court. Where the evidence as a whole establishes practical navigable capacity, the fact that navigation is difficult would not require a finding of non-navigability notwithstanding. But, where the question is whether certain recollection testimony, to be weighed with a mass of evidence contradictory thereof, establishes practical navigable capacity, the fact that the alleged trips, if they occurred, were at high water and even then were difficult and dangerous, not only has a proper bearing upon the weight to be accorded the testimony but also, shows that the testimony actually tends to establish non-navigability within the criteria enunciated by this Court.

This Court has had occasion to point out that the mere "physical possibility of passing by a boat" from one State to another is not sufficient to establish navigability (*Leovy v. United States*, 177 U. S. 621, 635). Petitioner assumes that, although difficulties may be so great as to preclude practical usefulness, the mere physical possibility of movement of some kind of boat under any conditions is not merely competent evidence upon, but conclusively establishes, navigability, notwithstanding a mass of other evidence showing that the stream is not susceptible of practical navigation. Decisions of this Court deny such a contention.

(2) *The lower courts' comment that any alleged movement outside of the lower parts of the improved sections above Hinton and Radford was irregular and sporadic and formed no appreciable part of any commerce of the region.*

In commenting upon that part of the recollection testimony urged by petitioner, the lower courts noted that any alleged movements of small boats, outside of the lower parts of the improved sections above Hinton and Radford, were irregular and sporadic and constituted no appreciable part of the commerce of the region (R. 114, 115; 2903). This petitioner asserts was error.

It is, of course, true that, where the evidence as a whole establishes a real capacity for practical usefulness, the mere fact that any past use has been sporadic, or has formed no appreciable part of the commerce of the region, would not negative navigability. Where such circumstances are explained by factors unrelated to the impracticability of use, such as was the case in *United States* v. *Utah*, 283 U. S. 64, they may not even be evidence tending to show non-navigability.

However, under the undisputed facts in this record the situation is quite the reverse. It is uncontroverted that the only alternative means of transportation was wagoning over bad roads at prohibitive cost so as to compel the use of any practical water transportation, no matter how difficult. The undisputed evidence established that, from the settlement of New River Valley in 1744, New River, had it been navigable, was a natural route for large part of the trade and commerce for the region and that the imperative need for some practical route down the New and Kanawha Valleys was continuously recognized, as is abundantly shown by the efforts of the State of Virginia to establish such a route.

Under these circumstances, the fact that even any alleged movement of small boats outside of the lower parts of the improved sections, above Hinton and Radford, was sporadic,

and constituted no appreciable part of commerce of the region, manifestly bore upon the weight to be given this nebulous and uncertain testimony, whether considered alone or in connection with the other evidence in the case. Under the undisputed facts, it would be unbelievable either that any use would be sporadic or an inappreciable part of the commerce of the region if in fact the stream had been susceptible of practical use. Thus these circumstances strongly tend, first, to show that such movements, if they occurred, were under unusual and temporary conditions or involved such difficulties as to be impracticable and, second, to deny practical usefulness in interstate commerce.

(3) *Abandonment and unprofitableness.*

Finally, in commenting on this testimony the lower court said:

> "but there was also testimony of non expert witnesses submitted by the defendant to the effect that the attempt to commercially use keel boats was unsuccessful and unprofitable, and in the Radford-Allisonia District was substantially abandoned before the railroad came to Allisonia in 1886" (R. 2903).

Where abandonment or unprofitableness of use is explained by circumstances other than the impracticability of navigation (such as absence of need for water transportation or competition with highly efficient means of land transportation); neither fact establishes non-navigability and under such circumstances may not even constitute evidence of non-navigability. There is nothing in the opinion of either court below to suggest the adoption of any other rule in this respect. However, where, as in the instant case generally —and particularly in the instance to which the lower court referred, the abandonment and unprofitableness of use were explicable only by New River's lack of practical usefulness for navigation, such circumstances had a proper bearing upon the weight to be attributed to the testimony, whether considered separately or in connection with the definite

evidence strongly negativing navigability. Indeed, under the circumstances such testimony was compelling evidence of non-navigability.

Theoretical navigability or attempted use without utility is not sufficient. In the case of charcoal and iron boating above Radford, to which the lower court specifically referred, the evidence established that such experimental boating (even though not attempted until after federal work had been done) proved so impracticable that it was soon abandoned, and that the furnaces were compelled to resume the costly wagoning of their iron to market (Resp. App. A. 48-53, 68-75). This was compelling evidence of lack of practical utility.

(4) *Petitioner's contentions erroneous in law.*

As above shown, petitioner's criticisms are unjustifiably directed to perfectly proper comments upon the nature and weight of certain items of testimony urged by petitioner. However, petitioner specifically concedes (Pet. Reply Br. 27) that all of these factors making against navigability were established by the evidence. There is, we submit, no decision of this Court in which a stream has been held navigable where all of these conceded indicia of non-navigability existed. Indeed, there is none where it has been held that any one of these indicia of non-navigability could not properly be weighed and considered in connection with the other evidence upon the issue unless the evidence in the case established that such indicia of non-navigability were explicable by factors unrelated to the impracticability of navigation. In the instant case the record is not merely barren of any such explanation but affirmatively establishes that such indicia are explicable upon no other basis than New River's lack of practical utility for purposes of navigation.

V.

Petitioner's comparison with the Desplaines River.

On oral argument and in its reply brief (6-7), petitioner purports to describe the physical characteristics of the Desplaines River and at least implies that such were its physical characteristics in a state of nature when it bore the extensive and valuable commerce upon the basis of which the Courts found it to have been navigable. (*Economy Light & Power Co.* v. *United States*, 256 U. S. 113.) The courts did not and could not base their determination upon the physical characteristics of the river in a state of nature —the only condition in which it had borne useful commerce.

Long before the hearing the water shed of the Desplaines had been radically changed from its condition in the state of nature. For instance, the drainage area had been reduced from 1428 square miles to 250 square miles, due to the construction of the Illinois & Michigan Canal in 1848 and other radical changes in the congested Chicago area (256 Fed. 792, 797). Its natural flow and even its natural low water profile were unknown. (*Economy* case, Trans. 585.) All of the testimony with regard to flow related to data privately collected during a 20-year period commencing in 1886, long after these radical changes had occurred. Even so U. S. Geological Survey figures (quoted by petitioner in its brief, p. 55, in *Appalachian Electric Power Co.* v. *Smith*) shows that the mean flow of the Desplaines at Joliet from 1922 to 1929 was 650 second feet. It is of course plain that the flow, after the river's drainage area had been reduced from 1428 to less than 250 square miles, was only a fraction of the flow which had prevailed under natural conditions.

Another and most extraordinary change was the actual diversion and shifting of the river itself from its natural channel "to the west and north side of the Valley", in order to "leave a site between the river as thus changed and the Illinois and Michigan Canal for the construction of the

drainage canal itself" (id. 797). Petitioner's statement (Pet. Reply Br. 6), that the controlling depths over the rapids and shallows of the Desplaines River were never more than 15 inches, refers to estimated depths (at a few points along the river) which were based on a gauge record kept at Riverside, Illinois, for the same 20-year period (256 Fed. 792, 795) and which of course do not show the condition of the river in its natural location and state during the century and a half of practical use.

The average slope of the Desplaines River is about 2½ feet per mile (256 Fed. 794), which compares with an average slope of 7.1 feet per mile on the New between Wilson Creek and its mouth and 5.5 feet per mile in the 40-mile stretch above Round Bottom, West Virginia. (See Resp. Br., Plate III). The bed and banks of the Desplaines River are soft and quite devoid of rocks and boulders. (*Economy* case, Trans. 639), while the bed and banks of New River consist almost uniformly of series of rock ledges strewn with huge boulders.

Contrary to petitioner's assumption, there was always (with the rare exception of a great Desplaines flood) necessary a portage over the low divide between the Chicago River and the Desplaines River, varying in length due in large part to the condition of the south fork of the Chicago River and of the west branch thereof.

Whatever may have been the natural condition of the Desplaines—which the courts did not know—, the facts were, as this Court found, that that condition had been sufficient to bring into being and sustain substantial commerce for more than 150 years. Petitioner's statement that the Circuit Court of Appeals "found only 14 specific instances of the use of the Desplaines for commercial navigation" (Pet. Reply Br. 7) must be read in connection with the court's statement that, in addition to the specific instances of use, there was evidence of "*very many other* trips" (256 Fed. 797), and that there were

> "*numerous historical references* to the Chicago-Illinois route * * * the fur trade was a *leading*

> *branch* of commerce in the *western world*, and *this trade* was one of the characteristics of the Desplaines River. *Large quantities* of supplies of various kinds needed by the settlers in a new country were also *transported over the Desplaines* during the same period in boats of the size and character then commonly used in river commerce." (id. 798).

Indeed this Court in *The Montello* case, 20 Wall. 430, 440, made reference to this use, stating:

> "Smith, in his history of Wisconsin, says: 'At this time (1718) the three *great avenues from the St. Lawrence to the Mississippi* were, one by the way of the Fox and Wisconsin Rivers, *one by way of Chicago* [which was the Chicago-Desplaines-Illinois River route], and one by the way of the Miami of the lakes * * *.'"

And this Court itself noted the fact that the Desplaines had been "of practical service as *a highway of commerce* for a *century and a half*." (256 U. S. 113, 124).

This extensive use was made of the Desplaines even though it flowed through an open prairie where even in a state of nature land travel, not only by foot and pack train but even by ox cart and wagon, was entirely practicable and indeed easy. In contrast, as regards the New River, the evidence conclusively shows that, although the difficulties of land travel down the New and Kanawha Valleys were of the most severe character, no use whatever was made of the New. The Lake Michigan-Desplaines-Illinois route, on the other hand, had been in practical use from the days of the earliest settlement of the continent.

VI.

Petitioner's criticism of respondent's revision of petitioner's chart is unfounded.

Before replying to petitioner's attempted criticism of respondent's revision of petitioner's chart (Pet. Reply Br., pp. 20-26), we again emphasize that respondent's egregious and indefensible method of purporting to weigh selected items of recollection testimony disregards all conflicting evidence of like character and of a higher order, the concurred in finding of the lower courts that the reports of the Army Engineers are the most reliable evidence upon the subject in the record, the fact that the circumstances of many such alleged trips make them evidence of non-navigability and the concurred in finding of the lower courts on the issue. Moreover, the question is not whether petitioner can find any evidence from which a contra-inference, in its opinion, could be drawn, but whether the concurred in finding of the lower courts is supported by substantial evidence. From that standpoint it is idle to discuss the details of items selected out of one of the numerous lines of testimony touching the issue which are found in the record. Nevertheless we briefly comment upon petitioner's criticism.

(a) *Incorrect use of testimony as actually recorded* (Pet. Reply Br., p. 21). Petitioner's line 2B, based upon the testimony of the witness Calloway, purports to represent the transportation of railroad construction materials from Hinton upstream to Glen Lyn. Contrary to petitioner's assertion (Pet. Reply Br., p. 21), respondent has not eliminated this line but has reduced it to show an indefinite movement from Hinton, first, to reflect the extent of any alleged knowledge of the witness according to his testimony, and, second, to reflect the fact that his testimony is inconsistent with well-known facts. It would also seem

that the line might well have been entirely eliminated as hearsay (R. 484). In any event it is quite clear that, assuming the materials were ever loaded on a boat, the witness did not have actual knowledge as to what upstream point or points the alleged transportation actually reached (R. 484-5). Petitioner's witness, A. G. Flannagan, whose assistant this witness (M. V. Calloway) was, made no mention of any such boating (R. 466-70). Calloway testified that these supplies were for the Norfolk and Western Railway and were checked out to its order and delivered in Hinton to a representative of that company (R. 483). Therefore, in view of the testimony of respondent's witness, Osborne (R. 1649 et seq.), it would appear that, if such supplies were taken by river from Hinton at all, they must have been taken to the railroad grading work in West Virginia below Round Bottom. Osborne, who occupied a responsible position with the railroad in connection with all of this construction (see p. 24 *infra*), testified that he neither knew nor heard of anything carried by boat to the railroad work at Glen Lyn (R. 1650-2; 1654-5). It seems quite clear that Calloway knew nothing of the alleged trip except that he claimed to have delivered supplies upon the order of a man who "came there with his auto" in 1883. This 91-year old witness was in fact testifying to a happening some fifty odd years after it was supposed to have occurred; and we think that his testimony indicates that this was not the only "slip of the tongue" made by him.

(b) *Duplication.* (Pet. Reply Br. p. 22) Petitioner's line 3B was eliminated because it plainly duplicated the similar part of petitioner's line 3A. The witness' testimony is more than "arguable justification" for the elimination of this obvious duplication. (R. 218-219, 223). While petitioner's argument, that its witness erroneously testified to having seen sluices, wing walls and artificial channels merely because he was asked a leading question, hardly adds to the weight or credibility of his testimony, the con-

tention is in fact erroneous. Without any suggestion, the witness voluntarily testified, in respect of the whole stretch covered by his testimony and particularly in respect to the falls between Radford and Hinton (R. 220), that there "was a sluice through there"; and when interrogated about the falls of the Narrows subsequently this occurred:

> "Q. You say this sluice is in the middle of that falls?
>
> A. I think so.
>
> Q. Is it pretty well marked?
>
> A. It is supposed to be, there is wing dams on each side of the sluices." (R. 221).

Petitioner's suggestion, that perhaps some works had been placed in the river by the Confederacy and that it might have been these to which the witness referred, is completely refuted by the reports of the Army Engineers. Major Craighill, reporting to the Chief of Engineers in 1872, would have described the existing works, had there been any, rather than to have said:

> "But little has been done by way of improving the river since the time of Moore & Briggs, though an effort is *said* to have been made in that direction by the confederate government during the late war." (R. 2279).

(c) *Hearsay.* (Pet. Reply Br. p. 23) Line 2A (also being based upon the testimony of the 91-year old witness Calloway) purports to show a movement of lumber, staves, and tobacco to Hinton from True, West Virginia, located about four miles above Hinton. Contrary to petitioner's assertion, this line has not been eliminated in respondent's revision but merely a symbol has been added to make clear an indefinite movement to Hinton. It could, of course, justifiably have been eliminated as pure hearsay. Petitioner does not deny the testimony was hearsay but contends that the witness' hearsay knowledge of the intended route was the full equivalent of actual observation, *non constat* the movement may never have been started, been diverted, interrupted, or

an utter failure. Such testimony is, we submit, clearly inadmissible. (*Ellicott* v. *Pearl*, 10 Pet. 412; 5 *Wigmore*, 3rd Edition, Section 1585). These authorities plainly show that the ruling of the District Court is inapplicable here. The testimony of this witness came in by deposition, it being understood it was objected to (R. 427-8; 482-3); and no specific ruling was made with respect to it. Since there was no jury the trial court allowed "much latitude in the introduction of evidence" (R. 106), rightly judging that it could later determine whether the evidence was entitled to any weight. Even if the testimony had been admissible (which we deny), its hearsay character would obviously have deprived it of any substantial weight.

(d) *Non-commercial items* (Pet. Reply Br. p. 23). Line 4C, as petitioner well knows, was not eliminated because the Government was the owner of the work boats taken from the section above Radford to Hinton for sale upon abandonment of the Government work, but because this movement was a construction maneuver involving physical possibility and not practicability and was not commerce carried on by the customary modes of trade and travel by water. Indeed the record plainly establishes that this movement, apart from its non-commercial character, was in fact evidence of non-navigability. The report of the Resident Army Engineer, praising the man in charge of this maneuver "for the energy and ability displayed in this movement", discloses that "after much difficulty" he, with a force of men, succeeded in floating these boats downstream in twenty-nine days—reflecting a progress of less than 2.7 miles per day (Ex. 39; R. 2401). The movement was in the spring (March and April) and petitioner's witness Owen testified that "the water was high" and "there was a right smart tide" (R. 249; Pet. Br. 51-2). The necessity of engaging in this difficult and laborious maneuver demonstrated that the boats were concededly useless anywhere except immediately at Hinton. The sale of all the Government property realized only $415.26 (R. 2397).

(e) *Testimony inconsistent with other evidence in the case* (Pet. Reply Br. p. 24). Line 6C purported to show boating of railroad supplies for the Norfolk & Western to Shumate's Falls. This testimony was plainly inconsistent with the testimony of Capt. Osborne, a division engineer supervising construction on the New River Railroad Division (of the Norfolk & Western) until the tracks were laid from Radford to a point down near Glen Lyn, at which time he took charge of laying the tracks, building stations and tanks and the like for the company, which work was finally completed on March 10, 1883 (R. 1650-1). Capt. Osborne testified that nothing was shipped up the river to Glen Lyn for the company, and he was in a position to know this. Nor did he observe any such use for the contractors. This is borne out by the testimony of Gerald (R. 1547 et seq.), Hundley (R. 1647-8), and the testimony of the following witnesses who were engaged in wagoning supplies to the contractors: Rufe Spangler (R. 1498); W. H. Spangler (R. 1503); S. L. Buckland (R. 1509-10); H. S. Skeen (R. 341-2). This is all fully shown in respondent's Appendix A, 100-7, with which petitioner does not attempt to deal except to say that it need not be analyzed. Petitioner's assertion that Capt. Osborne's testimony, given with reference to the division extending from Radford to Glen Lyn, dealt with the construction of another railroad, is entirely erroneous. Respondent's reference to R. 1652 is to the grading done by the company below Round Bottom in West Virginia to which some supplies probably were boated from Hinton, W. Va. (See Appendix A, supra) and not to the boating of stone from Pepper's Ferry as petitioner unjustifiably seeks to imply (Pet. Reply Br. 24). The latter was a ferrying operation which, although plainly evidence of non-navigability (Resp. Br. pp. 54-5), had nothing to do with the alleged boating to which line 6C referred.

(f) *Testimony inconsistent with well-known facts* (Pet. Reply Br. p. 25). Line 1A represented an alleged night trip of a family consisting of the witness (then seven or

eight years old), two brothers, a sister, the mother and father, from Eggleston Springs, Va., to True, West Va. (R. 458, 459). This alleged night trip would have involved negotiating, among others, The Falls of the Narrows, Shumate's Falls, Wiley's Falls, McDaniel's Falls and Bull Falls, at night by a family with small children. The Court has only to look at the photographs of the first three of these falls in Respondent's Appendix B to judge of the likelihood of such a happening. As to the witness' alleged spontaneous correction of his statement that the trip was made in 1870 (before the witness was born), reference to the reporter's transcript (1079-80) shows that there were six intervening questions and answers before Government counsel led as follows:

> "Q. That was in the year 1879?
> A. Yes sir, spring of the year."

As to the alleged corroboration of this singular testimony, the question is not whether any such extraneous statement can be found in the record but whether the testimony is negatived by facts established by substantial evidence. Moreover, it is strange that the single statement of witness Talbot should be the only such corroboration out of all of the maze of testimony in this case and even that affords no corroboration for the night trip described by the foregoing witness. Talbot testified concerning a boat in an entirely different stretch of the river, about a mile below Radford and 20 miles above Eggleston Springs—the upper or beginning point of the alleged Anderson nocturnal voyage (R. 458; 1541-2).

VII.

Contrary to petitioner's assertion on oral argument, the early engineering reports are consistent with later reports as to non-navigability of New River.

Petitioner's statement in oral argument, that prior to 1925 the War Department was of the opinion that New River was navigable and that not until that year did it hold the view that New River is non-navigable, is clearly contrary to the fact.

First, the various reports of the Chief of Engineers from 1873 to 1882 (Resp. App. A. 57-63) negative petitioner's statement. Those reports show, not that the stream was navigable in its natural condition but, that artificial improvements were necessary if outlets by river were to be provided, that is, that navigability could only be created artificially. Indeed, those reports plainly show that any precarious navigability which may have been temporarily attained, in any parts of the stretches in which federal work was done, depended upon, and was confined within the limits of, the small artificial channel created by the federal work (Resp. Br., pp. 45-6).

Second, various other reports of the War Department, all prior to 1925, likewise belie petitioner's statement. Thus the Report of the Chief of Engineers of 1887 states:

> "As *Congress has never given such a sum of money* as would justify the *proper beginning* of a *connected* project for a *continuous* navigation from the North Carolina border to Hinton, the effort has been to apply such funds as were supplied in *ameliorating* the condition of the river * * *" (Ex. 560, R. 2826).
>
> * * * * * * * *
>
> "For reasons often mentioned in annual and special reports, *no attempt has been made to give a continuous navigation* of the New River * * *" (Ex. 560, R. 2826).

In a report to the Secretary of War dated July 13, 1911, General W. H. Bixby, Chief of Engineers, stated:

> *"There has been no useful navigation on New River at any time, and none is possible under existing natural conditions, nor without the expenditure of vast* and *prohibitive* sums in improvement work" (Ex. 566, R. 2844).

and General W. W. Black, Chief of Engineers, included the same statement in his report to the Secretary of War of May 19, 1916 (Ex. 566, R. 2844).

Furthermore the Board of Engineers for Rivers and Harbors in 1912 reported:

> "Physical conditions are such that it *could not be improved for useful navigation except at prohibitive cost.* The board, therefore, reports, concurcurring with the views of the district officer and the division engineer, that *it is not advisable for the United States to undertake the improvement of New River from Radford, Va., to Hinton, W. Va.*" (House Doc. 1410, 62nd Cong., 3rd Sess., Ex. 46; R. 2420.)

Thus, contrary to petitioner's statement, there is evidence, in abundance, which shows that the War Department, not merely since 1925 but prior to that time as well, has been of the view that New River is non-navigable.

Respectfully submitted,

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